

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

KENNETH R. ARNOLD, as Personal
Representative of the ESTATE OF ROBERT
EARL PARKER,

Plaintiff,

vs.

CITY OF BOULDER CITY, et al.,

Defendants.

Case No. 2:04-cv-01093-BES-GWF

ORDER

This matter is before the Court on Defendants' Motion for Protective Order Pursuant to FRCP 26 (#27), filed on June 27, 2006; Plaintiff's Opposition to Motion for Protective Order (#31), filed on July 14, 2006; and Defendants' Reply in Support of Motion for Protective Order (#33), filed on July 28, 2006. A hearing on this motion was held on August 10, 2006.

FACTUAL BACKGROUND

The estate of Robert Earl Parker ("Parker"), deceased, has sued the City of Boulder City, Nevada ("City") and police officers, Officer Joseph "Tony" Norte and Officer Daniel, for injuries that Parker allegedly sustained during an arrest incident that occurred on August 15, 2002.¹ *Amended Complaint* (#6). According to the complaint, Parker was a passenger in a vehicle traveling in Boulder City that was stopped by the police. Parker allegedly complied with the officers' instructions to exit the

¹Parker was 73 years old at the time of the incident. He reportedly died of causes unrelated to the events that are the subject matter of this case.

1 vehicle. While Parker was exiting the vehicle, the driver allegedly told the police officers that Parker
2 suffered from Alzheimer's Disease. After Parker exited the vehicle, the officers allegedly violently
3 attacked and battered him without provocation or justification. The officers subsequently charged
4 Parker with a crime, but the charges were dismissed. *Id.*, ¶¶ 8-15.

5 Plaintiff's First Cause of Action alleges that the officers' use of excessive force violated
6 Parker's constitutional rights under the Fourth and Fourteenth Amendments and 42 U.S.C. §§ 1983 and
7 1988. The Second Cause of Action alleges a claim for intentional and negligent infliction of severe
8 emotional distress. The Third Cause of Action, entitled "Custom, Policy and Practice Civil Rights
9 Violation," alleges that "[t]he City of Boulder City grossly failed to train, supervise and discipline its
10 police officers in the fundamental law of search, arrest, detention, use of force, and how to interact with
11 the elderly and individuals with mental disease, all resulting in the attack on [Parker] by Defendant
12 Officers." *Id.*, ¶ 24. This cause of action further alleges that the City negligently hired the Defendant
13 Officers because it knew or should have known that they were not qualified or competent to be police
14 officers. *Id.*, ¶ 25. This cause of action also alleges that the Defendant officers acted in accordance
15 with an unlawful *de facto* policy of the City and that the City failed to take appropriate actions to
16 terminate this policy or to properly investigate, supervise and discipline its officers. *Id.*, ¶ 26. The
17 Fourth Cause of Action alleges a conglomeration of state law causes of action including assault and
18 battery, false arrest, malicious prosecution, abuse of process, conspiracy tort, and negligence. *Id.*, ¶¶
19 33-35. This cause of action also alleges that the City is liable for negligent hiring, training and
20 supervision of the Defendant officers. *Id.*, ¶ 36.

21 According to the police reports attached as SEALED Exhibit "A" (#28) to Defendant's Motion
22 (#27), the motor vehicle in which Parker was riding was stopped by the police based on suspicion that it
23 was involved in a felony "hit-and-run" accident. Because of the felony nature of the stop, the officers
24 drew their guns and ordered the occupants to exit the vehicle. According to the reports, after exiting the
25 vehicle, Parker refused to follow the officers' instructions and resisted their attempt to place him in
26 handcuffs. Defendants Norte and Daniel engaged in a physical altercation with Parker, forced him to
27 the ground and placed him in handcuffs.

28 . . .

1 Plaintiff served requests for production on Defendants which seek production of all documents
 2 supporting, concerning or regarding Defendants' answers to interrogatories, Request No. 1, and
 3 Officers Norte's and Daniel's personnel files, Request Nos. 2 and 3. These requests and Defendants'
 4 responses and objections are quoted at pages 4-5 of Defendant's Motion.² See *Motion for Protective*
 5 *Order* (#27), page 4.

6 Request No. 1 is sufficiently broad to include the City's Internal Affairs Division ("IAD")
 7 investigation file regarding the subject incident. Defendants' objection to this request stated as follows:

8 OBJECTION. Boulder City repeats and assert (sic) each and every
 9 objection asserted (sic) Plaintiff's Interrogatories. Boulder City further
 10 objects that certain documents responsive to this request contain personal
 11 and/or confidential information. Although Defendant is willing to
 12 produce relevant documents which are not privileged or confidential, any
 13 production must first be subject to an appropriate order. A proposed form
 14 of protective order and privilege log will be sent under separate cover.
 15 Not in limitation of the foregoing objections, Defendant respond (sic) as
 16 follows: See documents produced with Defendant's rule 26.1 disclosures
 17 and documents accompanying this response.

18 *Motion for Protective Order* (#27), page 4.

19 Defendants' response to Request Nos. 2 and 3 stated as follows:

20 OBJECTION that this request is vague and ambiguous, particularly, but
 21 not exclusively, as to what is meant by "files concerning"; and that the
 22 requested documents contain personal and confidential information.
 23 Although Defendant is willing to produce relevant documents which are
 24 not privileged or confidential, any production must be first subject to an
 25 appropriate order. A proposed form of protective order and privilege log
 26 will be sent under separate cover.

27 *Motion for Protective Order* (#27), pages 4-5.

28 A stipulated protective order governing the confidentiality and use of any documents produced
 to Plaintiff in response to the foregoing requests was filed on August 5, 2006. *Stipulation and Order*
 (#37). The Court has not been provided with any information whether Defendants ever served a

²The date that Defendants served their responses is not set forth in the motion, nor are copies of the Responses to Requests for Production attached to the Motion. A copy of Defendants Boulder City's Answers to Interrogatories is attached to the Motion and shows that they were served on September 13, 2005. *Motion* (#27). Absent other information, the Court assumes that Defendant's Responses to the Requests for Production were served at or about the same time.

1 privilege log regarding the aforementioned records as referenced in Defendants' objections.

2 DISCUSSION

3 In support of their arguments that the IAD investigation file and the officers' personnel files are
4 irrelevant, Defendants' Motion for Protective Order (#27) principally relies on *Maddox v. City of Los*
5 *Angeles*, 792 F.2d 1408 (9th Cir. 1986) and *Segura v. City of Reno*, 116 F.R.D. 42 (D.Nev. 1987).
6 Defendants also argue that the IAD investigation file and Officers Daniel's and Norte's personnel files
7 are protected from disclosure by the executive privilege. As to their claim of executive privilege,
8 Defendants again rely principally on *Segura v. City of Reno, supra*, and its application of factors set
9 forth in *Frankenhauser v. Rizzo*, 59 F.R.D. 339 (E.D.Pa. 1973).

10 1. Relevance of Internal Affairs Division (IAD) Reports.

11 Fed. R. Civ. Pro. 26(b)(1) generally provides that "[p]arties may obtain discovery regarding any
12 matter, not privileged that is relevant to the claim or defense of any party. . . . Relevant information
13 need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of
14 admissible evidence."

15 Defendants' objections to Request Nos. 1, 2 and 3 fail to clearly state an objection based on lack
16 of relevance, although Defendants' statement that it is willing to produce relevant information from the
17 files, subject to a protective order and to provide a privilege log, arguably indicates an objection to
18 producing irrelevant portions of these files. Plaintiff's Opposition (#31) does not take issue with the
19 adequacy of Defendants' objections or the fact that they apparently have not provided a privilege log
20 regarding the files. Instead, Plaintiff argues that the IAD and personnel files are sufficiently relevant to
21 justify his request for production of the entire files.

22 *Maddox v. City of Los Angeles*, 792 F.2d 1408 (9th Cir. 1986), did not directly deal with
23 discovery issues under Rule 26. The plaintiff in *Maddox* appealed from an adverse jury verdict on the
24 grounds that the trial court improperly excluded evidence that during a police department disciplinary
25 proceeding, the defendant police officer admitted to violating the City policy on use of the choke hold.
26 The Ninth Circuit affirmed the district court's ruling that this evidence was inadmissible under
27 Fed.R.Evid. § 403 because its prejudicial effect outweighed its probative value and also on the grounds
28 that the internal affairs investigation and measures taken by the City were remedial measures and

1 inadmissible to prove liability under Fed.R.Evid. § 407. The court also held that other evidence was
2 admitted regarding the City's policy regarding choke holds and the plaintiff was not prejudiced by
3 exclusion of the IAD investigation findings.

4 In *Segura v. City of Reno, supra*, 116 F.R.D. at 44, the court discussed *Maddox* in regard to
5 whether a police department internal affairs report was discoverable by the plaintiff. The court stated
6 that because the disciplinary findings are likely inadmissible at trial under Fed.R.Evid. § 403 and § 407,
7 the scope of relevant discovery regarding such documents was potentially limited, but not completely
8 precluded. In holding that portions of the IAD investigation file were relevant for impeachment
9 purposes, the court stated:

10 [T]he IAD investigation consists mostly of summarized fact statements
11 given by the plaintiffs and police officers in question. Because the
12 statements were made at an earlier time, their value as impeachment
material is clear. The fact summaries in the IAD report are thus relevant
and should be produced on that basis.

13 *Segura*, 116 F.R.D. at 44.

14 *Segura* held that the conclusions or findings of the IAD investigation regarding whether the
15 officers were guilty of using excessive force are not admissible evidence to prove that Defendants used
16 excessive force in the subject incident and, therefore was not relevant on that basis.

17 In this case, absent some other relevant purpose for discovering the conclusions reached by the
18 board of review or the police department, this information is irrelevant. Plaintiff has not identified any
19 relevant purpose for discovering the conclusions of the IAD investigation. Plaintiff is, however,
20 entitled to discover all factual information contained in the IAD file regarding the officers' or
21 witnesses' description of what transpired during the incident as it relates to whether excessive force was
22 used. At the hearing in this matter, Plaintiff also raised an issue regarding why there was no videotaped
23 record of the incident. The IAD file contains factual information regarding this matter which should
24 also be produced to the Plaintiff.

25 **2. Relevance of Defendant Officers' Personnel Files.**

26 In *Segura*, the plaintiff also sought to compel production of the police officers' personnel files.
27 The court held that the vast majority of the documents in these files were irrelevant and need not be
28 produced. The court noted, however, that there were some documents that could arguably be relevant.

1 Those documents consisted of memoranda of previous incidents in which the officers were accused of
2 excessive force. The court held, however, that all of those incidents were investigated and where the
3 department found that excessive force had been used, the officer was disciplined. Thus, the court held
4 that the information in the personnel files did not indicate any policy or practice by the police
5 department to fail to train and supervise its officers adequately. The court, therefore, held that the
6 documents were not relevant or discoverable on that basis. *Segura, supra*, 116 F.R.D. at 44.

7 *Segura* also held that evidence of other specific incidents in which the officers had used or been
8 accused of using excessive force were not admissible to prove that the officers used excessive force in
9 the case at issue. In this regard, the court cited Fed.R.Evid. 404(b) which provides that evidence of
10 other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action
11 in conformity therewith. The court held that the exceptions in the rule did not apply and, therefore, the
12 prior alleged incidents of excessive force were not discoverable. *Id.*, at 44. *Miller v. Pancucci*, 141
13 F.R.D. 292, 296 n. 3 (C.D. Cal. 1992) and *Ramirez v. County of Los Angeles*, 231 F.R.D. 407 (C.D.
14 Cal. 2005), and the cases cited therein, however, indicate that a less restrictive approach to discovery of
15 evidence of prior bad acts should apply. *Miller* states that evidence of prior bad acts may be admissible,
16 and therefore discoverable, to prove motive, opportunity, preparation, plan, knowledge, identity *or*
17 *absence of mistake or accident*. *Miller* also held, however, that requests for information regarding prior
18 complaints against the officers, not related to the allegations of excessive force in the complaint, were
19 irrelevant and not discoverable on that basis.

20 In holding that the personnel files were not discoverable, *Segura* also stated:

21 It might be argued that the documents could show that Police Chief
22 Bradshaw knew of these officers' past involvements with excessive force,
23 and that he failed to supervise their training adequately. In so doing,
24 defendant Bradshaw might then be liable for punitive damages. The
25 complaint in this case names Bradshaw only in his official capacity,
however, and alleges that he is liable for failing to institute the general
policy and procedures for training his officers. It does not allege that he
is liable for failing to supervise these officers personally. Thus, the
documents will not be released on that basis.

26 *Segura, supra*, 116 F.R.D. at 44.

27 Here, Plaintiff's amended complaint alleges claims against the City both for failing to institute
28 the appropriate general policies and procedures for training and supervising officers and also alleges

1 that the City is liable for negligently hiring, training and supervising the individual Defendant officers
 2 on the alleged basis that the City knew, or should have known that they were not qualified or competent
 3 to be police officers. Based on these allegations, this case is distinguishable from *Segura* in this
 4 respect. *Mueller v. Walker*, 124 F.R.D. 654, 658 (D. Or. 1989), also cited in Defendants' Reply,
 5 distinguished *Segura* on this basis.

6 Thus, evidence regarding prior complaints or incidents of excessive force by the officers are
 7 sufficiently relevant and discoverable. Based on its *in camera* review of the personnel files of Officers
 8 Daniel and Norte, however, the Court has not found that either officer's personnel file contains
 9 information of prior complaints or findings that the officers engaged in the use of excessive force. Nor
 10 does either personnel file contain information that either officer had a prior criminal record or other
 11 record of violence such that they were not competent or qualified to be police officers on that basis.

12 **3. Defendants' Executive Privilege Claim.**

13 In *Miller v. Pancussi*, 141 F.R.D. 292, 297-299 (C.D. Cal. 1992), the court held that federal law
 14 governs in regard to a claim of governmental interest privilege in actions brought under federal law for
 15 violation of the plaintiff's civil rights. See, *Kerr v. United States District Court for North. Dist.*, 511
 16 F.2d 192, 197 (9th Cir. 1975); *Kelly v. City of San Jose*, 114 F.R.D. 653, 656 (N.D. Cal. 1987). The
 17 court stated that in a federal civil rights case, the state's interest is that of a litigant and not, as in
 18 diversity cases, that of a sovereign whose law is being applied in the federal forum. The court further
 19 stated that it makes no sense to permit state law to determine what evidence is discoverable in cases
 20 brought pursuant to federal statutes whose central purpose is to protect citizens from abuses of power
 21 by state or local authorities. Thus, where state law bars discovery of relevant records or imposes higher
 22 burdens on a plaintiff to obtain relevant information than does federal law, the federal courts will apply
 23 federal discovery rules and the federal common law regarding privilege. *Miller v. Pancussi* further
 24 states:

25 "Federal common law recognizes a qualified privilege for official
 26 information. (Citation omitted). Government personnel files are
 27 considered official information." *Sanchez v. City of Santa Ana*, 936 F.2d
 28 1027, 1033 (9th Cir.1990). In order to determine whether personnel files
 sought are privileged, courts must weigh potential benefits of disclosure
 against potential disadvantages; if the latter is greater, the official
 information privilege may bar discovery. *Id.* at 1033-34. Such balancing

1 should be conducted on a case by case basis, determining what weight
2 each relevant consideration deserves in the fact-specific situation that is
before the Court. *Kelly, supra* 114 F.R.D. at 663.

3 The court further stated that this balancing test is “pre-weighted” in favor of disclosure
4 consistent with the related idea that privileges are generally to be narrowly construed and that doubts
5 about their applicability are to be resolved in favor of disclosure. *Miller, supra*, at 300, citing *Kelly v.*
6 *City of San Jose*, 114 F.R.D. at 662.

7 *Miller* also stated that the governmental privilege must be clearly asserted in the discovery
8 responses and, as in any case where a privilege is claimed, the defendant must sufficiently identify the
9 allegedly privileged documents so as to afford the requesting party an opportunity to challenge the
10 assertion of privilege. The court further stated:

11 Additionally, the party must submit, at the time it files and serves its
12 response to the discovery request, a declaration or affidavit, under oath or
13 subject to the penalty of perjury, from the head of the department which
has control over the matter. *Kerr, supra*, 511 F.2d at 198. The affidavit
or declaration must contain:

14 (1) an affirmation that the agency generated or collected the material in
15 issue and has in fact maintained its confidentiality (if the agency has
16 shared some or all of the material with other governmental agencies it
must disclose their identity and describe the circumstances surrounding
17 the disclosure, including steps taken to assure preservation of the
confidentiality of the material), (2) a statement that the official has
18 personally reviewed the material in question, (3) a specific identification
of the governmental or privacy interests that would be threatened by
19 disclosure of the material to plaintiff and/or his lawyer, (4) a description
of how disclosure subject to a carefully crafted protective order would
20 create a substantial risk of harm to significant governmental or privacy
interest, (5) and a projection of how much harm would be done to the
threatened interests if the disclosure were made.

21 *Miller, supra*, at 300.

22 *Ramirez v. County of Los Angeles*, 231 F.R.D. 407 (C.D. Cal. 2005), also discusses and follows
23 the requirements set forth in *Miller*. *Ramirez* also cited Judge Weinstein’s summary in *King v. Conde*,
24 121 F.R.D. 180, 191 (E.D.N.Y. 1988), regarding privacy interests of police officers who are defendants
25 in civil rights suits. Judge Weinstein noted that most information requested in these suits relates to
26 personnel records regarding prior involvement in disciplinary proceedings or citizen complaints. The
27 officers’ privacy interests in these matters are not substantial and should be limited in view of the role
28 played by the police officer as a public servant who must be accountable to public review. Judge

1 Weinstein noted that some requests might touch on intuitively more private domains such as the
2 officer's psychiatric history, but even disclosure of such records are permissible where they contain
3 relevant information. In this regard, the court in *Mueller v. Walker, supra*, 124 F.R.D. at 659, held that
4 the plaintiff was entitled to discover the officer's relevant psychological testing results pertaining to the
5 incident at issue or relating to prior violent episodes. Disclosure of such information to third persons
6 should, however, be restricted by a well drafted protective order such as has been entered in this case.³

7 In this case, the Court would be justified in disallowing Defendants' assertion of "executive
8 privilege" based on their failure to properly assert it. Defendants did not clearly identify this privilege
9 in their objections to Plaintiff's Request for Production of Documents other than to state vaguely "that
10 the requested documents contain personal and confidential information." Secondly, Defendants have
11 not produced a privilege log or an affidavit as described in *Miller, supra*. Plaintiff, however, did not
12 object to Defendants' request at the hearing on this motion that the Court conduct an *in camera* review
13 of the IAD file and the officers' personnel records to determine whether they contain relevant and
14 discoverable information that overcomes any claim of "executive privilege."

15 As stated above, the officers' personnel files do not reveal any relevant information regarding
16 prior excessive force complaints or incidents involving the Defendant Officers. Nor do the
17 psychological evaluations, employment applications or other information obtained by the City in the
18 employment hiring process indicate that the City obtained information that should have raised a concern
19 about either officer's potential for violent behavior and which should have disqualified them from
20 hiring. The Court, therefore, concludes that there is no relevant information in the personnel files of
21 either officer which should be disclosed to Plaintiff regardless of any claim of privilege.

22 CONCLUSION

23 Based on its *in camera* review of the internal affairs division (IAD) records, the Court orders
24 that certain bated stamped pages of the records, as redacted by the Court should be produced. The
25

26 ³The court in *Segura* evaluated whether the IAD investigation reports were protected from
27 disclosure by executive privilege under the ten factor test set forth in *Frankenhauser v. Rizzo*, 59 F.R.D.
28 339 (E.D.Pa. 1973). The court, however, did not discuss whether the privilege in that case had been
properly raised.

1 Court's redaction of the IAD records has been placed in a sealed envelope for pick up by Defendants'
2 counsel and should be produced as directed by this Order, subject to any objection to this Order and the
3 ruling thereon. Accordingly,

4 **IT IS HEREBY ORDERED** that Defendants' Motion for Protective Order pursuant to FRCP
5 26 (#27) is hereby **granted**, in part, and **denied**, in part.

6 In regard to the Internal Affairs Division investigation records, the Court has indicated by
7 yellow highlighting the portions of the records that may be redacted, i.e. not produced, and has placed
8 those materials in a sealed envelope for pick up by Defendants' counsel. In regard to such documents,
9 the Court orders that the following documents be produced:

- 10 1. Page 285, as redacted, should be produced.
- 11 2. Pages 286-290 should to be produced.
- 12 3. Pages 294 and 295, as redacted on page 295, should be produced.
- 13 4. Pages 296 and 297 should be produced.
- 14 5. Pages 298 and 299, as redacted on page 299, should be produced.
- 15 6. Pages 302 - 319 appear to be copies of the police reports and other information regarding
16 the subject incident, which have probably already been produced. These pages should be
17 produced.

18 DATED this 12th day of September, 2006.

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21 GEORGE FOLEY, JR.
22 U.S. MAGISTRATE JUDGE
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